(19) (18)

 Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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RULE 29.1 STATEMENT

Respondents hereby incorporate the Rule 29.1 statement in the Response to the Petitions for Certiorari.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case concerns the constitutionality of a federal statute, 47 U.S.C. § 533(b), which prohibits local telephone companies from providing video programming directly to subscribers in their telephone service areas. Section 533(b)(1) forbids telephone companies from "provid[ing] video programming" *in any way* "directly to subscribers" — whether they create such programming from scratch or instead edit and arrange programs created by others into a "programming" package.[1] Section 533(b)(2) bans telephone companies from providing this programming using their own facilities.[2] Together, these provisions constitute a ban on the expressive process of providing video programming of one's choice — *i.e.*, a ban on the editorial process itself.

Every one of the 16 federal judges who has considered the question has concluded that § 533(b) is invalid under the First Amendment. Every one of the agencies with responsibility over federal telecommunications policy has recommended the elimination of § 533(b), on the ground that the statute positively disserves any governmental interest in protecting consumers and fostering competition. Each House of Congress has now voted to repeal

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[1] Section 533(b)(1) provides:

> It shall be unlawful for any common carrier, subject in whole or in part to title II of [the Communications] Act, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

[2] Section 533(b)(2) provides:

> It shall be unlawful for any common carrier, subject in whole or in part to title II of [the Communications] Act, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

§ 533(b). A ban on speech so thoroughly repudiated cannot survive any form of First Amendment scrutiny.

A. THE HISTORY OF SECTION 533(b)

1. Section 533(b) had its genesis in a restriction imposed on telephone companies by the Federal Communications Commission ("FCC") in 1970. At that time, cable television — known as CATV ("community antenna television") service — was in its infancy. CATV operators built large antennas in rural areas and other places unable to receive clear television signals over the air and then strung cables, often on telephone or electric utility poles, from each central antenna to the CATV customers. Pet. App. 57a.[3]

CATV operators generally did not create, package, or arrange video programming. "Essentially, a CATV system no more than enhance[d] the viewer's capacity to receive the broadcaster's signals." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399 (1968). Under these circumstances, the prevailing understanding was that restrictions on CATV service did not implicate the First Amendment at all. *Id.*; *see also Buckeye Cablevison, Inc. v. FCC*, 387 F.2d 220, 225 (D.C. Cir. 1967).

In 1970, the FCC issued regulations prohibiting telephone companies from providing CATV service to their local subscribers and from furnishing pole attachments, conduit space, or other facilities to themselves or any affiliated entity for purposes of providing such service.[4] The FCC feared that "the telephone

[3] References to the decisions of the District Court and Court of Appeals, as reprinted in the Appendix to the Government's Petition for Certiorari, are styled "Pet. App. __a." References to the Federal Communications Commission's *Third Report and Order*, FCC 95-203 (May 16, 1995) are styled "Supp. Br. App. __a." References to the Joint Appendix in this Court are styled "JA __." References to the Joint Appendix in the Court of Appeals are styled "Ct. App. JA __." References to the Brief of the Federal Petitioners in No. 94-1893 are styled "Govt. Br. __." References to the Brief of Petitioner NCTA in No. 94-1900 are styled "NCTA Br. __."

[4] Final Report & Order, *Applications of Telephone Common Carriers for Section 214 Certificates*, 21 F.C.C. 2d 307 (1970) ("1970 FCC Order"), *codified at* 47 C.F.R. § 64.601 (1971).

companies had the potential to discriminate against independent CATV providers, in favor of telephone company affiliates, in granting access to telephone poles for attachment of the CATV cables." Pet. App. 59a (citing 1970 FCC Order at 324). The Commission was also concerned that telephone companies might "preempt the market" in the "new and emerging" field of CATV service before independent operators had an opportunity to deploy their networks. 1970 FCC Order at 324, 325. The Commission referred to pole and conduit access as "the potential seedbed of the controversy." *Id.* at 326. Acknowledging that it was "impossible to foresee" how the CATV industry would develop over the longer term, the FCC promised to reassess the matter in due course. *Id.* at 329.

2. Congress addressed the FCC's concern about telephone company control of poles by enacting the Federal Pole Attachment Act of 1978, codified at 47 U.S.C. § 224. The Act authorizes the FCC, together with state officials, to regulate the rates, terms, and conditions of pole access for cable companies. *Id.* at § 224(b)(1). Immediately after the Act's passage, the FCC established a mathematical formula for determining "just and reasonable" attachment rates, 47 C.F.R. § 1.1409(c), and mutually acceptable contracts were soon hammered out in every locality. Notice of Inquiry, *Telephone Company-Cable Television Cross-Ownership Rules*, 2 FCC Rcd 5092, 5093-5094 (1987); JA 174-75.

3. Section 533(b) was adopted as part of the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 521 *et seq.*), the principal purpose of which was to deregulate the cable industry. As the District Court observed, "[l]egislative materials relating to § 533(b) are sparse. No legislative findings of fact accompanied the provision." Pet. App. 61a. The most pertinent "reference to § 533(b) in the legislative history of the 1984 Cable Act is a passage in the House Committee Report, which indicates that the intent of the provision was 'to codify current FCC rules concerning the provision of video programming over cable systems by common carriers.'" *Id.* (quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984)). The same Committee Report explained, however, that the bill was not intended to prevent telephone companies from

transporting the video speech of others, but only from providing speech of their own. H.R. Rep. No. 934 at 57.

B. THE ORIGINAL BASES FOR THE BAN HAVE BEEN ELIMINATED BY CHANGED CIRCUMSTANCES

1. Since 1970, the cable industry has grown from a marginal supplier of passive antenna service to "our Nation's dominant video distribution medium." S. Rep. No. 92, 102d Cong., 1st. Sess. 3 (1991). In 1970, "CATV reached only approximately 9% of all homes and mainly consisted of small, limited capacity systems in remote communities." Pet. App. 65a. Now, cable television is available to 98% of the nation's homes, and at least 60% of the television households subscribe. *U S West, Inc. v. United States*, 48 F.3d 1092, 1102 (9th Cir. 1994), *petition for cert. pending*, No. 95-315; *see also* JA 197, 198.

In the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460 ("1992 Cable Act"), Congress documented the "undue market power" of cable operators which has resulted in "barriers to entry for new programmers and a reduction in the number of media voices available to consumers." §§ 2(a)(2), 2(a)(4), 106 Stat. 1460. *See generally Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2454-55 (1994). "Despite Congressional efforts to promote competition in the cable industry, the provision of cable television has remained a monopoly service in virtually every community." Pet. App. 66a. Fewer than 1% of cable markets are competitive. JA 199; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, at ¶ 13 (Sept. 28, 1994) (*1994 Competition Report*).

2. Technology has also changed dramatically since § 533(b) was adopted. In 1984, it was not feasible for telephone companies to provide video programming over the basic telephone network. JA 138. Even as recently as 1991, a Senate committee report assumed that "telephone company networks are incapable of carrying video signals to the home." S. Rep. No. 92, 102d Cong., 1st Sess. 18 (1991). Today, however, telephone companies can provide video programming over the telephone network, JA 138-

40, offering many new channels of communication to compete with incumbent cable monopolists. As the District Court observed, § 533(b) now excludes "the one class of potential competitors that has exhibited an inclination to compete with the entrenched monopolists [and] clearly operates in the first instance to restrict competition in the market for video programming." Pet. App. 96a.

3. In addition, since 1984, regulators have developed an entirely new set of rules governing telephone company provision of services like video programming. These rules prohibit anti-competitive acts and thus directly target all of the interests identified by the Solicitor General. Both the FCC and the Department of Justice have repeatedly concluded that the rules are fully effective. "Whatever might have been possible prior to the break-up of the unified Bell System, or before we instituted a comprehensive package of regulatory safeguards, the reality today is that the FCC does have effective tools, and has clearly demonstrated both the willingness and ability to use them." JA 352-53 (FCC Chairman Sikes); *see also* JA 355 ("the Department [of Justice] disagrees with those commentators who argue that the [FCC's] rules are inadequate to protect against anticompetitive conduct").

4. These changed circumstances have led every expert telecommunications agency, during both Republican and Democratic Administrations, to conclude that § 533(b) affirmatively *disserves* the very purposes that the petitioners claim it substantially furthers, and that the ban should be eliminated.[5]

After compiling a full administrative record over five years, in 1992 the FCC formally recommended the removal of § 533(b) on the ground that such action would "increas[e] competition in the video marketplace, spur[] the investment necessary to deploy an advanced infrastructure, and increas[e] the diversity of services made available to the public."[6] According to the FCC, lifting § 533(b) "would result in significant price savings for consumers."

[5] The agencies' conclusions are excerpted at JA 337-60.

[6] JA 337 (citation omitted); *see also* Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 5781, 5820 (1992) ("*Video Dialtone Order*").

JA 339-40. Reed E. Hundt, the current Chairman of the FCC, has testified that removing § 533(b) would foster "facilities-based competition," "expand the electronic marketplace of ideas," and result in "technological and service innovation, lower prices, and responsiveness to consumer tastes." JA 376-77.

In November 1994, the Commission reiterated its recommendation that § 533(b) be eliminated and explained that any residual anticompetitive risk "can and should instead be addressed through . . . appropriate regulatory safeguards."[7] In May 1995, the FCC released its *Third Report and Order*, Supp. Br. App. 1a-21a, which announced a dramatic reinterpretation of the Commission's "good cause" waiver policy, in light of the FCC's finding that "routinely" *waiving*, rather than *enforcing*, the ban would "promote competition." *Id.* at 9a-10a, 19a.

The Department of Justice has similarly concluded that telephone company "provision of video programming will have procompetitive benefits that outweigh any anticompetitive risks involved." JA 342 (citation omitted). In congressional testimony, Anne K. Bingaman, the current Assistant Attorney General, Antitrust Division, recently reaffirmed that telephone companies should be permitted to offer "both video and telephonic services in the same geographic areas." JA 381.

The National Telecommunications and Information Administration (NTIA), a unit of the Department of Commerce, has similarly determined that lifting § 533(b) "would significantly increase competition in the video services market, which would, in turn, yield lower prices to viewers, better service quality, and better programming diversity." JA 346. NTIA has also concluded that § 533(b) is "inefficient and anticompetitive" and that the risks it purports to address "are either overstated or can be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace." NTIA, *The NTIA Infrastructure Report, Telecommunications in the Age of Information* 235, 242 (1991) ("NTIA Infrastructure Report"); *see also* JA 382, 383.

[7] Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd 244 at ¶ 265 (1994).

In January 1994, the Administration released its "White Paper on Communications Act Reforms," which advocated removing § 533(b): "Although the existing cable-telephone company cross-ownership restriction of the 1984 Cable Act may have been appropriate when enacted, today it is an unnecessary and artificial barrier to competition in the delivery of video programming to American consumers and to investment in advanced local infrastructure." JA 370.

5. Each House of Congress has voted to repeal § 533(b): on June 16, 1995, the Senate passed S. 652 by a vote of 81-18, and on August 4, 1995, the House adopted H.R. 1555 by a vote of 303-117. Members of Congress explained that "[t]he cable television market will be made fully competitive as telephone companies are given the right to offer cable television services. . . . Consumers will see many new services, lower prices, and greater choices. The bill will also encourage new investments by telecommunications companies, building for our nation the much heralded national information infrastructure." 141 Cong. Rec. H 8459 (Aug. 4, 1995) (Rep. Boucher); *see also* 141 Cong. Rec. H 8281 (Aug. 2, 1995) (Rep. Bliley). Sen. Lott called § 533(b) "the equivalent of an 'Edsel' in the space and information age." 141 Cong. Rec. S 7906 (June 7, 1995). Sen. Kerrey stated that, in the absence of the ban, "'telephone companies might have offered cable service two decades ago and perhaps have prevented cable television monopolies in local markets.'" 141 Cong. Rec. S 8194 (June 12, 1995) (internal quotation omitted).

C. THE PROCEDURAL HISTORY OF THIS CASE

Bell Atlantic filed its complaint in December 1992. JA 6. After informal discovery, the factual issues were fully developed in a record of several thousand pages consisting of a comprehensive stipulation of facts, numerous undisputed affidavits, and extensive exhibits. As the District Court remarked, "it is difficult to imagine a more complete record." Pet. App. 57a. The parties filed cross-motions for summary judgment, with no party suggesting that there was any issue of material fact that would prevent the court from deciding the case on the existing record. Although the District

Court observed that § 533(b) cannot "be applied without reference to the content of the message being conveyed," *id.* at 85a, the court believed that the statute nonetheless qualified as "content-neutral" under this Court's decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). However, the District Court held that § 533(b) was a "draconian approach" that "does not fit with its asserted justification," Pet. App. 99a, 102a, and thus could not survive intermediate scrutiny.

The Court of Appeals also found that § 533(b) was content-neutral. Pet. App. 28a. But the court held that § 533(b) failed intermediate scrutiny because it was not narrowly tailored to the Government's asserted interests and failed to leave telephone companies with sufficient alternative channels for communication. *Id.* at 38a-51a.

Subsequently, nine additional, separate lawsuits challenging § 533(b) were filed across the Nation. Every one of the other federal courts to consider the question has agreed that § 533(b) violates the First Amendment.[8] Not a single judge has dissented.

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[8] In addition to the decisions below, see *U S West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash.), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *petition for cert. pending*, No. 95-315, 64 U.S.L.W. 3160 (Aug. 23, 1995); *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *petition for cert. pending*, No. 95-315, 64 U.S.L.W. 3160 (Aug. 23, 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994), *appeal pending*, No. 94-7036 (11th Cir.); *Ameritech Corp. v. United States*, 867 F. Supp. 721 (N.D. Ill. 1994), *appeal pending*, No. 95-1223 (7th Cir.); *NYNEX Corp. v. United States*, No. 93-323-P-C (D. Me.) (Dec. 20, 1994), *appeal pending*, No. 95-1183 (1st Cir.); *GTE South, Inc. v. United States*, No. 94-1588-A (E.D. Va. Jan. 13, 1995), *appeal pending*, No. 95-1738 (4th Cir.); *United States Telephone Ass'n v. United States*, No. 1:94CV01961 (D.D.C. Feb. 14, 1995), *appeal pending*, No. 95-1175 (D.C. Cir.); *Southwestern Bell Corp. v. United States*, No. 3:94-CV-0193-D (N.D. Tex. Mar. 27, 1995), *appeal pending*, No. 95-10478 (5th Cir.); *Southern New England Telephone Co. v. United States*, No. 3:94-CV-80 (D. Conn. Apr. 27, 1995), *appeal pending*, No.95-6137 (2d Cir.); *see also GTE California, Inc. v. FCC*, 39 F.3d 940, 951 (9th Cir. 1994) (Noonan, J., dissenting) (concluding, where majority did not reach merits, that § 533(b) is "counterproductive. . . . It does not even survive rationality review.").

SUMMARY OF ARGUMENT

I. Section 533(b) is properly subject to invalidation under strict scrutiny for at least two separate reasons. First, it is a direct ban on speech — the editorial process of selecting, assembling, and packaging programming for provision directly to subscribers — and nothing but speech. Thus, § 533(b) bans the very acts that this Court has identified as warranting First Amendment protection in the cable context. *See Turner*, 114 S. Ct. at 2456.

Section 533(b) flatly excludes telephone companies from what is indisputably the Nation's most important medium of communication. JA 152-57. Although reasonable time, place, and manner rules are permissible, "[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983). This Court has made clear that "prohibitions foreclosing entire media" — particularly "important and distinct" media of expression — are ordinarily impermissible even if they are "completely free of content or 'viewpoint discrimination.'" *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994) (invalidating ordinance that banned residential signs).

In addition, § 533(b) is subject to strict scrutiny for the separate reason that it *is* content-based. Section 533(b) "requires reference to the content of the relevant message in order to determine whether a particular visual image qualifies under the statutory definition of video programming," Pet. App. 84a — *i.e.*, "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). "[B]y any commonsense understanding of the term, the ban in this case is 'content-based.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516-17 (1993). Indeed, the definition of "video programming" is so inherently subjective as to amount to a "know-it-when-we-see-it" standard. It vests an administrative agency, the FCC, with impermissibly broad power over speech.

II. Even if strict scrutiny did not apply, § 533(b) could not survive intermediate scrutiny because it is not narrowly tailored to any significant governmental interest. *Every* expert telecommunications agency has concluded that § 533(b) is affirmatively *anti-competitive*and that existing regulatory safeguards could be adapted to serve any governmental purpose supposedly fostered by § 533(b). It is thus impossible for the Government to meet its burden of "demonstrat[ing] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 114 S. Ct. at 2470.

The Government contends that § 533(b) prevents telephone companies from attempting to increase their profits by improperly shifting costs from video programming activities to regulated telephone service. But the undisputed record is that there is no risk of cost shifting in the absence of common costs, and that there are no common costs between the provision of video programming and the operation of the telephone network. If the problem of potential cost misallocation exists at all, it exists with respect to video transport, *which § 533(b) does not prohibit*. Moreover, every expert telecommunications agency has determined that existing regulatory safeguards are fully adequate to address any danger of cross-subsidy. The FCC's response to any difficulties in applying these rules has been to err on the side of *overcompensating* against any cross-subsidy risk. Accordingly, even if the cross-subsidy concern were valid, § 533(b) prohibits far more speech than is necessary to achieve the Government's purposes.

The Government also asserts an interest in preventing telephone company discrimination against cable companies in providing access to poles and conduit. But regulators have long disregarded this as a serious concern because cable networks are already fully deployed and accessible to 98% of the television households in the United States. The Pole Attachment Act ensures fair and reasonable rates. If, for some reason, the Act is not entirely up to the task, it can be amended or new regulations can be promulgated.

In the end, the Solicitor General is forced to fall back to the hypothesis that Congress might have concluded that § 533(b) is needed as a prophylactic measure to avoid the complexities and inconveniences of more narrowly targeted regulation. But Congress has made *no* findings in support of § 533(b), either in 1984 or in

the ensuing years. The only formal actions taken have been the recent votes by each House to repeal § 533(b).

More fundamentally, the Government's entire argument is foreclosed by elementary principles of narrow tailoring. The Government is not entitled to silence speech for the sake of convenience or as added insurance supposedly to *guarantee* that its interests are met. *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1802-04 (1993); *Schneider* v. *State of New Jersey*, 308 U.S. 147, 164-65 (1939). If the Government is concerned about discrimination, it can ban discrimination. If it is concerned about cross-subsidy, it can ban that. But in neither event may it simply ban speech.

In addition, § 533(b) fails intermediate scrutiny because it does not leave open adequate alternative avenues of expression. Section 533(b) has no more constitutional validity than a law prohibiting the *Washington Post* from publishing a newspaper but leaving it free to communicate through handbills, magazines, books, and billboards. Each of the Solicitor General's proffered alternatives is wholly inadequate. For example, he proposes that telephone companies might create programming and offer it to other, independent companies, such as local broadcasters or cable companies, who might or might not choose to distribute it to the public. But the denial of the telephone companies' editorial freedom can hardly be overcome by subjecting them to the editorial discretion of others.

III. The FCC's *Third Report and Order* cannot save § 533(b). That Order is nothing more than a statement of the FCC's unilateral intent, subject to change at any time in the Commission's discretion, to permit telephone companies to provide video programming under certain "terms and conditions" still to be devised by the Commission. Supp. Br. App. 6a n.11, 13a-14a. The *Third Report and Order* is in effect a promise voluntarily to cease the challenged conduct — a promise the FCC has twice breached by banning telephone companies from providing video programming over their networks despite outstanding federal court orders enjoining enforcement of the ban. The *Third Report and Order* provides no reason for this Court to refrain from holding § 533(b) unconstitutional.

Moreover, petitioners' "saving construction" is not a serious one. It contradicts the sole authoritative judicial interpretation of

§ 533(b)(4), as well as the prior determinations of the FCC. Furthermore, far from "saving" the statute, the construction would *exacerbate* the constitutional defect in § 533(b), by giving the Commission impermissibly broad licensing power over telephone company speech. And the construction would require this Court to decide the difficult constitutional question of whether telephone companies can be required to provide video programming exclusively through common carrier video transport systems, known as "video dialtone."

ARGUMENT

I. SECTION 533(b) IS INVALID UNDER STRICT SCRUTINY

Section 533(b) is subject to invalidation under strict scrutiny for at least two independent reasons.

A. SECTION 533(b) IS A DIRECT BAN ON SPEECH ITSELF, NOT A RESTRICTION ON CONDUCT, OR ON THE "TIME, PLACE OR MANNER" OF SPEECH

1. Section 533(b) bans telephone companies from providing, directly to their subscribers, video programming of the companies' own creation, selection, or arrangement. It "prohibits a common carrier from selecting or providing the video programming to be offered over a cable system" in the telephone company's service area. H.R. Rep. No. 934, 98th Cong., 2d Sess. 57 (1984). Certainly, therefore, § 533(b) bears no resemblance to a restriction on "conduct" that has merely an "incidental" effect on speech when applied to an expressive instance of that conduct. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Rather, § 533(b) is a direct ban on speech and nothing but speech. As the District Court observed, "[t]he telephone company only runs afoul of the statute by exercising control or discretion over the programming transported . . . ." Pet. App. 102a; *see also id.* at 15a n.10 (§ 533(b) is a ban on "the provision, with editorial

control, of cable television services") (emphasis omitted). Section 533(b) targets the very acts of expression that this Court has identified as warranting First Amendment protection in the cable context. *See Turner*, 114 S. Ct. at 2456. Accordingly, § 533(b) is infirm for the same reason that the ban on editorial control over parades was unconstitutional in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995). In fact, in *Hurley* this Court drew an explicit parallel to the very kind of editorial discretion that § 533(b) bans telephone companies from exercising. *See* 115 S. Ct. at 2345 ("Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others.").

Strict scrutiny is not limited to bans on speech that are based on the viewpoint, subject, or other "content" of the message being communicated. *See, e.g., Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 126 (1991) (Kennedy, J., concurring in judgment). Rather, strict scrutiny extends as well to bans like § 533(b) that tell speakers (especially a select *set* of speakers, *see City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988)), even in a content-neutral way, that they may not provide, at any time or place, speech to the audience and in the manner of their choosing. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (no live entertainment); *Buckley v. Valeo*, 424 U.S. 1, 15, 16, 17, 39, 44 (1976) (*per curiam*) (limits on political expenditures); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (limits on distributing literature door-to-door).

2. Section 533(b) is readily distinguishable from the cross-ownership rules cited by petitioners (Govt. Br. 3 n.2, 25 n.15; NCTA Br. 13 n.12, 46-48), for it is a ban on speech that does not even address the issue of ownership or control. "Cross-ownership" rules prevent an entity from owning two distinct media properties side by side. A TV broadcast station owning a newspaper in the same community is engaged in cross-ownership. *See* 47 C.F.R. § 73.3555(d) (1994). Section 533(b) does not prohibit telephone companies from constructing, buying, or *owning* cable systems *even within their own telephone service areas* — so long as an independent entity selects and arranges the video programming that

is provided to viewers.[9] In the District of Columbia, for example, Bell Atlantic owns the cable system and leases it to an unaffiliated company which provides the programming. JA 207-08.[10]

Section 533(b) is instead a rule that prohibits a speaker from using even its own facilities to provide speech of its own choosing. It would be, for example, as if the Manchester *Union Leader* were permitted physically to print and distribute newspapers, but banned from having its writers compose articles and its own editors select and arrange particular stories for publication.

3. This Court has consistently held that laws like § 533(b), which substantially foreclose an "important and distinct" medium of expression, cannot properly be characterized as "time, place, or manner" rules. *City of Ladue v. Gilleo*, 114 S. Ct. at 2045. Moreover, this Court has always distinguished between "a reasonable restriction on the manner" of speech and "a direct regulation of . . . speech itself." *Edenfield*, 113 S. Ct. at 1801. Section 533(b) plainly falls into the latter category. True time, place, and manner rules do not interfere with a speaker's ability to communicate the same speech to that speaker's chosen audience. *Ward v. Rock Against Racism, Inc.*, 491 U.S. 781, 802 (1989).

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[9] H.R. Rep. No. 934 at 57 (§ 533(b) does not "prevent a common carrier from constructing . . . a local distribution system that is capable of delivering video programming . . . [or] from leasing . . . such a system to a . . . cable operator"); *Video Dialtone Order*, 7 FCC Rcd at ¶ 111 (telephone companies are not barred "from acquiring existing cable facilities and leasing the physical plant to the franchised cable service provider").

[10] The cross-ownership rules cited by petitioners, together with *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"), are also inapposite because they relate to the specialized broadcast context governed by *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as this Court — and every lower court to consider § 533(b) — has recognized. *See Turner*, 114 S. Ct. at 2456-57; Pet. App. 21a-22a, 73a-74a; *U S West*, 48 F.3d at 1098; *BellSouth*, 868 F. Supp. at 1339; *Ameritech*, 867 F. Supp. at 729-31. *NCCB* reflects the power of government, in the "unique" medium of broadcasting, *Turner*, 114 S. Ct. at 2457; *Red Lion*, 395 U.S. at 367, to deny broadcast licenses to local newspapers. This special power has no application in this case. Indeed, *NCCB* explained that "the broadcast media pose unique and special problems not present in the traditional free speech case." 436 U.S. at 799 (internal quotations omitted).

The FCC has described § 533(b) as an "absolute ban" that "prohibits [telephone companies] from choosing the video programming to be provided in their local exchange telephone service areas *altogether*." Supp. Br. App. 3a, 4a (emphasis in original). Indeed, the practical effect of § 533(b) is to exclude telephone companies from what is indisputably "the most important mass medium in America." JA 142. The average television household watches television seven hours per day, whereas the average U.S. resident spends less than half an hour per day reading a newspaper. JA 196. The Government itself has recognized that the "'power to communicate ideas through sound and visual images . . . is significantly different from traditional avenues of communication because of the immediacy of the medium.'" *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (quoting FCC), *cert. denied*, 482 U.S. 919 (1987).

Nor can § 533(b) be saved from strict scrutiny simply because it does not prohibit *every conceivable means* of communication potentially available to telephone companies. In *Ladue*, for example, this Court invalidated a law banning homeowners from posting signs even though it did not prevent them from "taking out a newspaper advertisement, handing out leaflets on the street . . ., standing in front of [a] house with a handheld sign," or even displaying flags with written messages. 114 S. Ct. at 2045, 2046 & n.16; *see also Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (limit on distribution of literature is "no restriction . . . with respect to time or place"). Indeed, if § 533(b) could be deemed a "manner" restriction, then any ban on speech could be similarly described, so long as it left open some *possible* means of expression — whether soapbox oratory, purchase of a television station, or any of the other alternatives posited by petitioners in this case.

And § 533(b) is surely not a "place" restriction, despite its geographical reference, because it would permit telephone companies to provide video speech only in an entirely different region of the country — *i.e., to an entirely different audience*. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163 (ban on leafletting

in public streets invalid even though it left "persons free to distribute printed matter in other public places").

B. SECTION 533(b) IS CONTENT-BASED

1. Section 533(b) also triggers strict scrutiny for the independent reason that it is content-based. It prohibits telephone companies from providing their subscribers with "video programming," defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(19). For example, a telephone company may offer stock market quotes, but not *Wall Street Week in Review*; on-line airline guides, but not a show about travel; educational multimedia presentations combining text, sound, and video, but not *Sesame Street*. *Video Dialtone Order*, 7 FCC Rcd at ¶¶ 76, 77 & n.196.

This statutory line has nothing to do with "the mode of delivery of the speech" (Govt. Br. 21) — in all of the examples, the speech would be delivered via the telephone network. Rather, the line is drawn according to the expressive attributes of the content of the speech: whether it is "generally considered comparable to programming provided by a television broadcast station" in 1984. *Video Dialtone Order*, 7 FCC Rcd at 5820; JA 363-64.

2. "[B]y any commonsense understanding of the term, the ban in this case is 'content-based.'" *Discovery Network*, 113 S. Ct. at 1513, 1516-17 (distinction between "commercial handbills" and "newspapers" is content-based, even though "[t]here is no doubt a 'common sense' basis for distinguishing between the two"); *see also Burson v. Freeman*, 504 U.S. 191, 207 (1992); *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984). Indeed, the Government concedes that a law distinguishing among "commercial or noncommercial, independent or network-affiliated, English or Spanish language" programming *would be* content-based. Govt. Br. 19 (quoting *Turner*, 114 S. Ct. at 2460). In no sense can a law singling out programming on the basis of whether it is "generally considered comparable to" 1984 television programming be deemed "content-neutral."

3. The Government's attempts to shield § 533(b) from strict scrutiny misconstrue settled First Amendment jurisprudence. For example, the Government insists that § 533(b) is not content-based because it supposedly "is not motivated by hostility to any message." Govt. Br. 20. But the motive of the legislature is irrelevant in determining the applicable level of scrutiny for a law that *by its very terms* discriminates on the basis of content. *Turner*, 114 S. Ct. at 2459 ("the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content"). The Government suggests that § 533(b) should be less than strictly scrutinized because it is viewpoint-neutral. Govt. Br. 22. But it is axiomatic that viewpoint neutrality is not the same as content neutrality. *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518 (1995) (striking down a ban on anonymous leafletting that "applie[d] evenhandedly to advocates of differing viewpoints, [because it was] a direct regulation of the content of speech"); *Burson*, 504 U.S. at 197; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987).

The Government also maintains that § 533(b) should be exempt from strict scrutiny because it can be *justified* without reference to the content of speech. But this Court has never indicated that a law which is content-based *on its face* can escape strict scrutiny because the Government's litigators can, with enough ingenuity, formulate a content-neutral rationale for it. If the contrary were true, almost any content-based law could avoid strict scrutiny.

4. Section 533(b) is also invalid because it vests an administrative agency with impermissible discretion over speech. The Government concedes that "instances may arise in which it will be difficult to determine whether a certain series of video images is 'comparable to' television broadcasting." Govt. Br. 22. The FCC has explained, for example, that interactive video programs "generally" fall outside § 533(b)'s prohibition, but "the mere inclusion of *some* interactive capability" would not take programming outside the ban. *Video Dialtone Order*, 7 FCC Rcd at 5821 & 5822 n.195 (emphasis added). In addition, according to the FCC, an "educational multimedia presentation which may contain video images" is not covered by § 533(b), but "the simple inclusion of *some* textual information" in a video program does not

make it a permissible multimedia presentation. *Id.* at 5822 n.196 (emphasis added). "[T]he Commission will allow telephone companies to transmit presentations that are *primarily textual*, and include *some* video segments, but will prohibit presentations that are *primarily video*, and include *some* textual segments." Pet. App. 87a (emphasis added).

It is not surprising that the Court of Appeals — even though it considered the statute content-neutral — nonetheless found this scheme constitutionally suspect. Pet. App. 29a n.22. The line between the permissible and the forbidden is far too subjective — like a statute leaving to an administrator the task of banning paintings "comparable" to those of Monet. The problem is not of the FCC's making; rather, the "know-it-when-we-see-it" quality of the *statutory definition* of video programming vests the FCC with the power and duty to "apprais[e] facts, . . . exercise . . . judgment, and . . . form[] an opinion," creating an intolerable "danger of censorship and abridgement of our precious First Amendment freedoms." *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992) (citations omitted); *see also City of Lakewood*, 486 U.S. at 757 ("the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused"); *Niemotko v. State of Maryland*, 340 U.S. 268, 272 (1951) ("custom" and "practice" insufficient restraint on discretion where "[n]o standards appear anywhere").

II. SECTION 533(b) CANNOT BE UPHELD EVEN UNDER "TIME, PLACE, OR MANNER" SCRUTINY

The Government contends that § 533(b) is a content-neutral "time, place, or manner" restriction that may be upheld under "intermediate scrutiny" so long as it (1) is "narrowly tailored to serve a significant governmental interest," and (2) "leave[s] open ample alternative channels for communication of the information," *Ward*, 491 U.S. at 791. But § 533(b) fails both prongs of this test. Its flat ban on video programming restricts far more speech than necessary to achieve any legitimate governmental interest, and none

of the alternative channels of communication that it leaves open is an adequate substitute for the video programming that it proscribes.

A. SECTION 533(b) IS NOT NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST

Under the "narrow tailoring" requirement, the Government must demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 114 S. Ct. at 2470 (plurality opinion). Although a regulation need not be "the least speech-restrictive means" available, the Government must show that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* at 2469 (quoting *Ward*, 491 U.S. at 799).

That inquiry is particularly searching in the case of "preventative rules," like § 533(b), that impose "comprehensive bans" on entire categories of speech. *Edenfield*, 113 S. Ct. at 1802, 1803. As the Court has explained: "'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Id.* at 1803-04 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

By its very nature, a prohibition on speech designed to prevent collateral harms — such as a ban on leafletting to prevent littering (*Schneider*, 308 U.S. 147), or a limitation on charitable fundraising to prevent *fraudulent* fundraising (*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)), or a ban on soliciting to prevent *unwanted* door-to-door soliciting (*Martin v. City of Struthers*, 319 U.S. 141 (1943)) — risks burdening First Amendment freedoms to a greater degree than necessary to achieve the Government's lawful purpose. Thus, "[i]f the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. If the government wants to protect householders from unwanted solicitors, it may enforce 'No

Soliciting' signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say." *Turner*, 114 S. Ct. at 2479 (O'Connor, J., concurring in part and dissenting in part) (internal quotations and citations omitted).

Section 533(b) suffers from the same constitutional infirmity. It bans video programming by telephone companies, not because much (or, indeed, *any*) of the speech thereby proscribed is itself harmful or undeserving of First Amendment protection, but assertedly because allowing a telephone company to provide such speech will encourage it to engage in anticompetitive "cross-subsidization" and "discrimination" to the detriment of telephone and cable consumers.

As we explain below, however, the Solicitor General has utterly failed to justify this sweeping prophylactic rule. The anticompetitive harms that he hypothesizes are rooted impermissibly in speculation and conjecture, not in the hard evidence that this Court's precedents require. The hard evidence is that 25 years of excluding telephone companies from providing video programming have produced cable monopolies in 99 percent of markets nationwide. Accordingly, every relevant governmental agency has concluded that the ban actually *disserves* the Government's purported objectives. But even if that threshold hurdle could be surmounted, the Solicitor General has not come close to justifying a flat ban on speech itself in preference to a direct ban on the feared anticompetitive conduct.

The most that the Solicitor General can say is that outlawing video programming is a "simpler" way to achieve the Government's objectives. Govt. Br. 31. But the Government can *always* say that. On the Solicitor General's theory, "comprehensive bans" on speech "would be permitted as a matter of course," *Edenfield*, 113 S. Ct. at 1803, a result altogether out of harmony with this Court's First Amendment precedents. It is no doubt "simpler" to outlaw leafletting than to enforce a law against littering, and more efficient to bar all household soliciting than to enforce a law prohibiting unwanted soliciting. But this Court repeatedly has ruled "simply and emphatically that the First Amendment does not permit the State to sacrifice speech for

efficiency." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (citing *Schneider*, 308 U.S. at 147 and *Schaumburg*, 444 U.S. at 620). That principle is fatal to § 533(b).

1. The Government's Interest in Preventing Cross-Subsidy Cannot Justify a Ban on Video Programming

The Solicitor General argues that § 533(b) furthers the Government's "significant" interest in preventing "cross-subsidy." If telephone companies were free to provide video programming within their telephone service areas, the argument goes, they "would have an incentive to allocate the costs of their cable services to their monopoly telephone operations, and to have regulators set higher telephone rates based on those shifted costs." Govt. Br. 3. Having thus fooled the regulators, telephone companies could then effectively "subsidize their affiliated cable entities with monopoly telephone profits," thereby unduly burdening telephone ratepayers and subjecting cable competitors to unfair competition, all to the detriment of consumers. *Id.*

It is important to understand what "cross-subsidy" means in this context. A cross-subsidy can occur only if a cost-plus, rate-of-return regulated company is able to increase the profits from its regulated business by misallocating costs from an unregulated, competitive business to its regulated business. When cost-plus recovery is guaranteed, the more costs the better. Such a scheme can occur, however, only when there are costs in common between the regulated and unregulated businesses that can be shifted.

Given this background, the Solicitor General's effort to square § 533(b) with this regulatory concern is riddled with logical flaws.

a. The first problem with the Solicitor General's cross-subsidy theory is that § 533(b) is simply irrelevant to this regulatory issue. The statute does not ban the improper allocation of costs from unregulated to regulated services. It does not even address an activity that has common costs with telephone service. As both courts below properly found, Pet. App. 42a-43a, 101a-102a, what § 533(b) actually bans — the provision, with editorial control, of video programming by telephone companies — has *no* common

costs with telephone service. JA 274-75.[11] Conversely, § 533(b) leaves telephone companies entirely free to *transport* video signals generated and arranged by others, a service that *does* have common costs with telephone service.[12]

There is thus a complete mismatch between § 533(b) and the Government's supposed interest in preventing cross-subsidy. It is as if the State in *Schneider* had sought to prevent litter, not by banning littering, or even by banning the distribution of readily disposable leaflets, but by banning instead the distribution of any leaflets *containing the distributor's own message*. Just as the identity of a leaflet's author has nothing to do with the risk of litter, the identity of the video programmer whose signals are transmitted over a telephone company's facilitites has no link to any risk of cross-subsidy.

b. Petitioners speculate that a ban on video programming "removes the incentive" for telephone companies to engage in improper cost-shifting. Govt. Br. 25. According to petitioners, telephone companies already have the *power* to "cross-subsidize their video transport facilities," but their *incentive* to do so "would be greatly enhanced" if they were allowed to provide video programming, because that "would increase the value to the phone company of monopolizing transport." *Id.* at 26-27 (internal quotations omitted).

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[11] NCTA's own expert concedes that there are no common costs between telephone service and anything that § 533(b) actually prohibits. *See* JA 243. Thus, as NCTA has acknowledged, "opportunities for cross-subsidization may be few in the creation of programming." NCTA Mem. at 23, *United States v. Western Elec. Co.* (D.D.C. filed Oct. 17, 1990).

[12] It was stipulated below that, as a result of rapidly advancing technology, telephone companies (as well as cable companies) increasingly can transmit voice, data, and video signals over common network facilities. JA 195-96, 201-02; *see also* JA 138-41. "This kind of joint or common use is not an evil in itself: on the contrary, it is a source of efficiency — a clear exemplification of what economists refer to as economies of scope." JA 273 (affidavit of Prof. Alfred E. Kahn). Even under traditional rate-of-return regulation, the resulting economies will *benefit*, not harm, telephone ratepayers, so long as any joint costs of a common facility are allocated to video services.

As a threshold matter, petitioners' convoluted speculation about incentives is precisely the kind of "conjectural harm" that this Court rejected in *Turner*, 114 S. Ct. at 2470. As the Court of Appeals observed, "the FCC's contemporaneous discussions of its rule do not even hint at the complex of incentives and evils . . . involving the cable transport and video programming markets." Pet. App. 47a.

Even taken on its own terms, petitioners' argument is wrong. First, the goal of the cross-subsidizing firm is to increase its profits. If telephone companies actually could cross-subsidize video transport service without sacrificing overall profits, they would be doing that *now*. Money is money. Whether video programming is *more* profitable than video transport is beside the point, for the opportunities (if any) for cross-subsidy are limited to the joint costs associated with video transport.

The petitioners find themselves tripping over one another on this point. The Government asserts that, absent the ability to provide programming, a telephone company "has no incentive to drive cable companies out of business." Govt. Br. 27 (internal quotes omitted). But NCTA argues that "telephone companies have a uniquely strong incentive" to do so *now* because of "the competitive threat that cable presents to the telephone business itself." NCTA Br. 9, 37 & n.31; *see also* JA 187-88.

Second, there is a further mismatch between § 533(b) and the Government's "incentive" argument: the statute is not, despite the Government's claims, a ban on telephone companies' "earning profits" (Govt. Br. 26) from cable television. In fact, § 533(b) *allows* a telephone company to construct or purchase a cable system, arrange for a third party to choose the programming the system will offer, and share in the profits of that cable system — through rental income, for example, or through a direct 5% ownership in the third party operator. 47 C.F.R. § 63.54(e). A telephone company in such circumstances has a strong financial interest in the continued profitability of the cable system, despite its inability to select the programming. Even if it held no ownership stake in the cable operator, and even if rent were not computed directly on the basis of the cable system's profits, the telephone company would understand that the more valuable the property, the

higher the rent it could charge. A telephone company need not be involved in the direct provision of video programming at all: It could simply charge unaffiliated video programmers monopoly rates for carriage. Pet. App. 44a n.30.

c. Petitioners' arguments about cross-subsidy rest on the further erroneous supposition that regulators would be powerless to *prevent* telephone companies from improperly shifting to their regulated telephone services the costs of their competitive video services. But the FCC already "has in place a comprehensive system of cost allocation rules and cost accounting safeguards designed to separate nonregulated service costs from regulated service costs." *Video Dialtone Order*, 7 FCC Rcd at ¶ 92.[13] The FCC's response to the assertedly "complex" task of allocating joint costs (Govt. Br. 31) has been to *overcompensate* by assigning to a telephone company's *non*regulated activities a share of common costs substantially in excess of the incremental costs of those services.[14] And the Commission has "recently strengthened these cost accounting safeguards in order to ensure that the Commission is able to prevent and detect abuses should they occur. . . . Based on [its] experience with such safeguards, [the FCC] continue[s] to believe that they constitute an effective means of preventing cross-subsidization between regulated and unregulated services." *Video Dialtone Order*, 7 FCC Rcd at ¶ 92.

Every other telecommunications agency agrees with the FCC. The NTIA has concluded that the FCC's rules "are extensive and effective in controlling cross-subsidy." *NTIA Infrastructure Report*

[13] These rules (1) impose detailed cost allocation standards, (2) establish accounting procedures, audit requirements, and other implementation and enforcement mechanisms, (3) require carriers (with operating revenues in excess of $100 million) to obtain FCC approval of a detailed cost allocation manual, and (4) set rules for recording transactions between regulated telephone companies and their corporate affiliates. *See* Report and Order, *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd 1298, 1299 & n.70 (1987).

[14] "Far from permitting cross-subsidization of competitive by monopoly services, regulators have typically handicapped telephone companies in the competitive markets — inefficiently so." JA 278.

at 23. The Department of Justice has determined that FCC rules should be sufficient protection against cross-subsidy. Ct. App. JA 2767. The courts have also repeatedly upheld the FCC's accounting safeguards as "reasonably designed" to prevent cross-subsidization. *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378, 1379 (D.C. Cir. 1990); *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1580-81 (D.C. Cir.) ("the FCC has acted since the break-up to tighten its accounting rules, especially its treatment of joint costs"), *cert. denied*, 114 S. Ct. 487 (1993); *California v. FCC*, 39 F.3d 919, 926 (9th Cir. 1994) ("[W]ith the implementation of these measures, the FCC has demonstrated that the [telephone companies'] incentive and ability to cross-subsidize will be significantly reduced"), *cert. denied*, 115 S. Ct. 1427 (1995); *U S West*, 48 F.3d at 1105-06; *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1182 & n.8 (D.C. Cir. 1995); *BellSouth*, 868 F. Supp. at 1342-43; *Ameritech*, 867 F. Supp. at 734-36.[15]

d. The regulatory premises of petitioners' cross-subsidy argument are flawed for yet another reason. As petitioners admit, cross-subsidy is a theoretical danger only to the extent that a telephone company is subject to traditional cost-plus rate-of-return regulation, under which carriers are allowed to recoup their costs of providing service plus a reasonable return on investment. Govt. Br. 3, 26, 35; NCTA Br. 5, 8, 11 & n.9, 37 n.31, 38 n.35, 42 n.37. But the FCC and a majority of the States now regulate the rates of the largest telephone companies under "price cap" rules that break the traditional link between costs and rates. *See National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993). "Under price caps, a [telephone company's] rates are governed by factors outside of its control, such as the inflation index, rather than by direct costs. Thus, a [telephone company] would have little incentive to shift costs from nonregulated activities to regulated ones because it would not be able to increase regulated rates to

[15] That regulators may still occasionally "find evidence of cost-shifting" (Govt. Br. 34 n.24) proves only that the existing rules are vigorously enforced, not that they are ineffective.

recapture those costs." *California v. FCC*, 39 F.3d at 926; *see also Western Electric Co.*, 993 F.2d at 1580.

As the FCC itself only recently reiterated, "our price cap rules prevent telephone companies from raising interstate telephone service rates to recover nonregulated cable television investments."[16] The Department of Justice likewise has acknowledged that, under price caps, "[a] regulated firm would be unable to evade constraints through cross-subsidization. . . ." Ct. App. JA 1748. And NCTA's own expert has admitted that a pure price cap arrangement that severs the relationship between rates and costs would "reduce or eliminate the incentive to shift costs to regulated services. . . ." JA 263.[17] The mere availability of such obvious less burdensome measures to satisfy the Government's interests demonstrates that the restriction on speech is not narrowly tailored — even if those measures have not yet been adopted. *E.g.*, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995); *Discovery Network*, 113 S. Ct. at 1510 & n.13.

The alternative of price cap regulation also shows that any risk of cross-subsidy here would stem *not* from a telephone company's

[16] Fourth Report and Order, ¶ 18, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt. No. 87-266, FCC 95-357 (Aug. 14, 1995). *See also* JA 350-51 (FCC Memorandum); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7577-78 (1991) ("the adoption of price cap regulation . . . constitutes an effective complement to cost allocation, reporting, and enforcement safeguards, to reduce . . . incentives to cross-subsidize"), *aff'd in relevant part and rev'd in part*, 39 F.3d 919 (9th Cir. 1994).

[17] In this Court, too, the NCTA concedes that if "pure" price caps were widely adopted § 533(b) would be "substantially overbroad." NCTA Br. 37 n.31. In fact, the FCC, in new price cap rules adopted in April 1995, gave telephone companies the option to select precisely such a "pure" price cap mechanism for interstate services. First Report and Order, ¶¶ 19, 220, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, FCC 95-132 (Apr. 7, 1995). Most of the companies subject to price caps have chosen that option. Fourth Further Notice of Proposed Rulemaking, ¶ 8, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, FCC 95-406 (Sept. 27, 1995). Over 15 States, including many of the largest such as Michigan, Illinois, Pennsylvania, Virginia, and Wisconsin, have adopted pure price caps for intrastate services.

entry into competitive services but from a regulator's decision to choose rate-of-return regulation rather than price caps.[18] It would be wholly antithetical to the First Amendment to allow the Government to justify a ban on speech as needed to protect against regulatory risks of its own creation.

2. The Government's Interest in Preventing Anticompetitive Discrimination Cannot Justify a Ban on Video Programming

a. The Solicitor General argues that § 533(b) "is necessary to prevent [telephone companies] from abusing their control over the poles and conduits essential to the operation of a cable system (as the FCC concluded in 1970)." Govt. Br. 35. In 1970, however, cable television service was accessible to fewer than 10% of all households, and there was no legislation governing rates for pole and conduit access. The FCC believed that the then-nascent cable industry would be jeopardized if telephone companies were free to enter that business. *See* Govt. Br. 5.

That concern has no current vitality. In the Pole Attachment Act of 1978, Congress authorized the FCC, together with state officials, to "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1). Cable industry representatives themselves testified, even then, "that *access* to utility poles does not in itself constitute a problem." S. Rep. No. 580, 95th Cong., 2d Sess. 16 (1978) (emphasis added). The FCC staff likewise concluded as long ago as 1981 that "[t]he problem of pole access does not by itself justify banning crossownership." JA 62. The cable industry has since matured into an entrenched monopoly

[18] *See, e.g.*, JA 56 (FCC Staff Report) ("This rationale for a crossownership ban is dependent on the assumption [of] rate of return regulation . . . . If regulators ignore reported costs and set rates on other grounds . . . the incentive to shift costs would likewise vanish"); *id.* at 72, 76 (FCC Staff Report) ("Many problems of telephone behavior are caused by rate-of-return regulation . . . . [R]ate regulation gives telephone companies strong incentives to engage in cost-shifting."); *id.* at 278 (Reply Aff. of Alfred E. Kahn) ("the cross-subsidization [petitioners] predict is possible only to the extent a telephone company's services are subject to cost-based, rate-of-return regulation").

to which "some ninety-eight percent of American homes have access." *U S West*, 48 F.3d at 1102. And the FCC accordingly has concluded that the "necessary access to poles and conduit to permit the growth of the cable industry has generally occurred." *Notice of Proposed Rulemaking*, 3 FCC Rcd at 5854; *see also* NTIA Infrastructure Report at 233.

Even if there were some residual concern about the cable industry's access to poles and conduit, that certainly could not justify § 533(b). As the District Court correctly noted, Pet. App. 102a n.29, "there is no doubt" that the law could be strengthened to guarantee non-discriminatory access, either by legislation,[19] or by FCC regulation,[20] as the Department of Justice has in fact proposed (Ct. App. JA 548), without any suppression of speech.

b. The Solicitor General also argues that § 533(b) eliminates any incentive for telephone companies to discriminate against competing video programmers who want to provide their programming via the yet-to-be-upgraded telephone network. Govt. Br. 5, 36-37. But telephone companies do not control any essential facility that these programmers need. *Cable companies,* which have deployed their own completely separate transmission networks and are not dependent on the telephone network for delivering their programming to customers, currently monopolize delivery of all multichannel video programming. Telephone company provision of video programming would greatly *expand*, not reduce, opportunities for independent programmers to reach their audiences.[21] It is perverse for the Government to cite a hypothetical

[19] *E.g.*, H.R. 1555, 104th Cong., 1st Sess. §§ 242(a)(6), 244(b)(6) (1995); S. 652, 104th Cong., 1st Sess. § 251(b)(5) (1995); S. 1200, 102d Cong., 1st Sess. § 656 (1991) (Ct. App. JA 3109); H.R. 2546, 102d Cong., 1st Sess. § 656 (1991) (Ct. App. JA 3343).

[20] *See* Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd 244, at ¶ 285 (proposing rule "to prevent LECs from denying cable systems reasonable access to their pole or conduit space for the purpose of preventing competition from these cable systems").

[21] *See, e.g.*, JA 342 (Department of Justice) (lifting ban "will create an alternative player with whom third parties can bargain to carry their

potential for abuse against unaffiliated programmers as a justification for § 533(b), when lifting the ban would give these very programmers a voice that cable incumbents have denied to them.[22]

3. Section 533(b) Cannot Be Justified on the Basis of the Government's Preference for Administrative Convenience or Its Version of Regulatory History

The Government argues that, even if it would be "*possible* to prevent" cross-subsidy and discrimination through regulatory safeguards that do not interfere with expression, Congress was entitled to choose the "simpler" approach of outlawing speech in order to avoid the "administrative" inconvenience of narrowly targeted measures. Govt. Br. 31, 37 (emphasis in original). But, under either intermediate *or* strict scrutiny, considerations of ease and efficiency cannot justify a comprehensive ban on speech. *Edenfield*, 113 S. Ct. at 1802-04; *Riley*, 487 U.S. at 795. When the Government anticipates harmful effects supposedly associated with speech, the "simpler" way to guard against those harms will *always* be a complete ban on the speech.

The Government insists that Congress at least had "substantial evidence" on which to base its "choice of a simpler" ban on speech in preference to more precisely targeted regulatory solutions. Govt. Br. 31, 32. But even if this were relevant, the three items to which the Government points — the history of the AT&T divestiture, a

programming"); JA 324 (Affidavit of Robin Smith) ("independent producers . . . need and would welcome the development of new distribution channels and new program packagers").

[22] Even with respect to voice and data information services conveyed exclusively over the phone network, the Government has documented at length that "there is no substantial risk that a [telephone company] could impede competition through discrimination" against competing content providers. Ct. App. JA 2631, 2635; *see also* Ct. App. JA 2772 ("existing regulation effectively constrains [telephone company] discrimination"). The FCC has similarly found that existing regulations will "address any concerns . . . with respect to discriminatory access." Ct. App. JA 2627 (FCC Mem. as *Amicus Curiae, United States v. Western Electric Co., Inc.*, C.A. No. 82-0192, at 11 (D.D.C. filed Aug. 22, 1990)).

1981 FCC Staff Report, and two reports from the General Accounting Office — could not support the surmise that regulatory safeguards "have significant disadvantages." Govt. Br. 31.

First, although petitioners cite the AT&T divestiture some 29 times in their briefs, it actually proves the opposite of what they claim. As part of the 1982 consent decree that broke up the Bell System and spawned the seven independent Regional Bell Operating Companies,[23] the parties voluntarily agreed to include a prohibition on telephone company provision of "information services," including cable television and database services like LEXIS/NEXIS. "[T]here really was no record to speak of concerning AT&T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how the divestiture of AT&T would affect development of this embryonic market." *United States v. Western Electric Co.*, 900 F.2d 283, 307-08 (D.C. Cir.) (*per curiam*), *cert. denied*, 498 U.S. 911 (1990). The Government itself said a "nonconsensual ban" on such services "would raise serious First Amendment issues." Ct. App. JA 1936 n.175; Ct. App. JA 2917 n.273.

If the Government's professed concerns about anticompetitive risk in video programming had any force, they would apply *a fortiori* to voice and data information services, which are often conveyed exclusively via local telephone exchanges over which telephone companies supposedly exercise "bottleneck" control. Yet in 1987, the Government asked the decree court to *eliminate* the information services restriction, concluding that there was "no substantial possibility that a [Bell Company] could . . . impede competition," Ct. App. JA 1906, 1909, and "no factual basis for" objections that telephone companies "would engage in cross-subsidization." Ct. App. JA 2790. In its decision affirming the decree modification, the D.C. Circuit endorsed the Government's determinations (1) "that there was no substantial risk that removal of the [information services] ban would lessen competition"; (2)

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[23] *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

that "regulation would play a substantial role in minimizing any anticompetitive risks"; and (3) "that removal of the ban would benefit consumers by enhancing competition in information services." *United States v. Western Electric Co.*, 993 F.2d at 1578. In fact, the court found that the evidence supporting the Government's request was so strong "that any district court rejection of the proposed modification would have been reversible error," and any findings that "contradict[ed] the Department's conclusions [would have been] clearly erroneous." *Id.*

Second, petitioners rely heavily (Govt. Br. 7, 26, 31-32, 35, 36; NCTA Br. 8-9, 38, 42, 43) on a November 1981 staff report, *FCC Policy on Cable Ownership* (*"Staff Report"*) (reprinted at JA 31-78). But they exaggerate the report's conclusions. The report acknowledged the significant pro-competitive benefits of telephone company provision of cable service. JA 43-52. But it concluded that the cable service ban should "be retained for the time being," JA 42, because the Commission's regulatory apparatus was still undeveloped: no "mechanism currently exists to separate cable costs from telephone costs." JA 58. The staff also noted that "further development of competitive technology" may render the restriction "unnecessary." JA 64.[24]

Changes in technology, market conditions, and regulation have made the Staff Report's recommendation obsolete. In particular, the report pre-dated the FCC's development of its cost-allocation regulations. In 1988, the Commission itself expressly rejected any prior reliance on cross-subsidy concerns as having occurred before the Commission "devised accounting standards that would prevent cross-subsidization." Further Notice of Inquiry and Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules*, 3 FCC Rcd 5849, 5854 (1988). Not surprisingly, the conclusions of the Staff Report have subsequently

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[24] The Staff Report did not represent the Commission's official views. In fact, the only Commissioner to comment on the issue filed a separate statement decrying what he called the "regulatory insanity" of not permitting telephone companies to enter cable television markets immediately. JA 27-29. He described the justifications for the ban as "sheer fantasy" and the predictions of anticompetitive harm as "border[ing] on hallucination." *Id.* at 27.

been repudiated by the FCC, the Department of Justice, the NTIA, and every reviewing court to consider the issue.

Third, petitioners claim that two reports issued by the GAO confirm the danger of cross-subsidy when telephone companies provide competitive services. But the GAO concluded not that § 533(b) — or any restriction on telephone company activities — should be retained but merely that FCC audit staff levels should be increased and that more on-site audits should be conducted.[25] And the FCC has since addressed this concern by requiring telephone companies to hire independent auditors to conduct annual audits.[26] Thus, the GAO reports confirm, rather than refute, the efficacy of regulatory mechanisms substantially less speech-restrictive than the prohibition imposed by § 533(b).

4. No "Deference to Congress" Is Warranted

The Government admits that Congress made no relevant factual findings in adopting § 533(b). Govt. Br. 29. But the Government's brief is nonetheless littered with suppositions about what "Congress reasonably concluded," *id.* at 31, and the Government suggests that Congress has somehow made a "predictive judgment" about the value of § 533(b) "to which the courts owe substantial deference." *Id.* 32 n.21. This argument is untenable.

In *Turner Broadcasting Co.*, a plurality of this Court emphasized that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 114 S. Ct. at 2454, 2461, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the

[25] *See* JA 86 ("GAO recommends that FCC develop a strategy for providing greater oversight of telephone companies' cost allocations. The key to the strategy is FCC's commitment to allocate sufficient audit staffing and travel funds to permit added field audits."); JA 134 ("expanded coverage through additional on-site audits by FCC would give ratepayers and the Congress greater assurance that cross-subsidization is not occurring").

[26] *See Computer III Remand Proceedings*, 6 FCC Rcd 7571, 7582. The GAO has admitted that these independent audits "should help." JA 85.

Government has met its burden of justification under intermediate scrutiny. *Id.* at 2471. This case is a step removed from that context.

Here, Congress has never made *any* findings that § 533(b) is necessary to address the specific interests identified by the Solicitor General. In fact, the only evidence cited of the supposed "predictive judgment" made by Congress is taken from snippets of legislative history that *post-date* passage of the ban. For example, the Solicitor General points to a 1990 Senate Commerce Committee report stating that the Committee "'could not at the present time'" support repeal of § 533(b) but adding (in a passage that he does not quote, *see* Govt. Br. 34) that "[t]he Committee wants the expert agency, the FCC, to examine the question." S. Rep. No. 456, 101st Cong., 2d Sess. 9 (1990). The FCC undertook such an examination, concluded that § 533(b) impedes competition, and recommended that it be removed. And in recent months each House of Congress has overwhelmingly voted to *repeal* the ban on video programming, signalling profound disagreement with the very rationale advanced by the Solicitor General and the cable incumbents before this Court.

Petitioners also suggest that, in adopting the 1992 Cable Act, Congress made a deliberate decision not to lift § 533(b). But the very Senate report they cite reveals otherwise: "the [Commerce] Committee decided that the question of whether telephone companies should be permitted to play a greater role in the cable market should be considered separately [from the question of whether to re-regulate cable]. . . . The Committee will [continue] to examine these issues." S. Rep. No. 92, 102d Cong., 1st Sess. 18 (1991). Indeed, the available evidence suggests that the Committee mistakenly believed that telephone networks would not soon be technologically capable of transmitting video programming. *See* pp. 4-5, *supra*.

In short, there are no congressional "findings" to which this Court could defer. By contrast, every expert governmental agency has explained in painstaking detail that each of petitioners' claims is wrong, in analyses that the Solicitor General has elsewhere argued are "particularly appropriate to respect." Br. of Govt.

Respondents in *Turner*, No. 93-44 at 30 (urging deference to the FCC's "predictive judgment").

B. SECTION 533(b) IS INDEPENDENTLY INVALID BECAUSE IT FAILS TO LEAVE OPEN ADEQUATE ALTERNATIVE AVENUES OF COMMUNICATION

Section 533(b) cannot be viewed as a mere limitation on the "manner" of speech. *See* Part I-A, *supra*. But even if the statute did not foreclose an entire medium, it would still fail intermediate scrutiny because it does not leave telephone companies with adequate alternatives for delivering their video speech. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984). The Court of Appeals properly invalidated § 533(b) on this independent ground. Pet. App. 49a-51a.

1. "The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). For example, in *Edenfield*, this Court invalidated under intermediate scrutiny a ban on in-person solicitation by accountants even though it allowed them to solicit by mail or advertisement. 113 S. Ct. at 1799-1801.[27] Here, petitioners' proffered alternatives are no more adequate as a substitute for direct provision of video programming over the telephone network than the opportunity to distribute handbills is an adequate alternative for operating the *New York Times*.

2. Petitioners nonetheless claim that § 533(b) leaves open other means for telephone companies to engage in video speech (Govt. Br. 23-24, 37-38), but their proffered alternatives fall into three flawed categories. First, petitioners argue that telephone companies could *create* programming and offer it to television

[27] *See also International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2723 (1992) (Kennedy, J., concurring in the judgment) ("the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within . . . its airports"); *id.* at 2727 (Souter, J., concurring in the judgment in relevant part) ("A distribution of preaddressed envelopes is unlikely to be much of an alternative.").

stations, cable operators, and others, who would decide whether, when, and how it would be *shown*. This would leave telephone company speech subject to the editorial control of others, and is thus no alternative at all, any more than writing letters to the editor is an alternative for publishing a newspaper.

Second, petitioners claim that telephone companies could bid to buy one of the few broadcast stations in each local market, or compete with other speakers to lease one or two channels that might be available on some local cable systems under the leased access provisions of 47 U.S.C. § 532. *See* JA 284-85. But each of these alternatives would severely constrain the amount of speech telephone companies could deliver.[28] Absent § 533(b), telephone companies could provide not one or two channels of video programming, but hundreds or thousands. JA 169; Description of Broadband Technologies' FLX System at 1 (Oct. 1992) (attached to Def. Supp. Jt. App. Exh. 2 & 3 in Dist. Ct.) (single, hair-thin glass fiber could provide over 1,500 channels). And telephone companies could provide essentially unlimited amounts of video programming through interactive services like video on demand, which would allow consumers to select (and view at their leisure) shows and movies from video libraries with no inherent limits. JA 151-52, 169-70, 288-89. Thus, it was undisputed on the record below that these first two categories of "alternatives" would exclude 99% of the programming that Bell Atlantic would supply directly to consumers in the absence of § 533(b). JA 288.

Third, the Solicitor General now stresses an additional category of supposed alternatives using new and unproven services, such as wireless cable ("MMDS") or direct broadcast satellite ("DBS"). Neither of these alternatives is remotely adequate. In

[28] In practice, leased access channels also remain subject to the editorial control of cable operators. JA 284, 289-90. Congress itself has concluded that "leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or to cable subscribers." H.R. Rep. No. 628, 102d Cong., 2nd Sess. 39 (1992); *see also* Donna N. Lampert, *Cable Television: Does Leased Access Mean Least Access?*, 44 FED. COMM. L.J. 245, 248 (Mar. 1992) ("the access provisions of the Cable Act have wholly failed to serve their intended purpose").

contrast to the existing telephone network, which reaches 100 million subscribers nationwide, DBS and MMDS have yet to achieve more than 1 percent of market penetration after more than two decades of development.[29] Moreover, both DBS and MMDS are broadcast technologies licensed by the government, and licenses are in short supply.[30]

In short, neither DBS nor MMDS is the kind of demonstrably adequate, "practical substitute[]" that intermediate scrutiny demands. *Ladue*, 114 S. Ct. at 2046; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). Accordingly, § 533(b) is unconstitutional for the separate reason that it fails to leave open adequate alternative channels for communication.

III. THE FCC'S THIRD REPORT AND ORDER CANNOT "SAVE" SECTION 533(b)

Throughout this case, petitioners have advanced a series of procedural smokescreens to avoid a decision on the merits. In the District Court, the Government challenged Bell Atlantic's standing.

[29] "[L]ess than 1 percent of . . . multichannel service consumers get their television from direct broadcast satellites." 141 Cong. Rec. S 8422 (June 15, 1995) (statement of Sen. Lieberman). DBS systems broadcast the same programming nationwide, with no opportunity to carry the local broadcast stations that still account for some two-thirds of audience viewing time (*1994 Competition Report* at ¶ 97), or to tailor programming to local audiences as Bell Atlantic proposes. JA 150, 172.

Similarly, "wireless cable has not achieved significant penetration nationwide," reaching only about half a million subscribers. *1994 Competition Report* at ¶ 79. Wireless cable transmitters must have line-of-sight access to customer homes in order to deliver programming. Consequently, many homes are unable to receive service from this technology because they are blocked by trees, hills, or buildings. According to the FCC, the average wireless cable operator has access to only 75 percent of the homes in its service area. *Id.* at ¶ 87.

[30] MMDS operators "have [had] difficulty in gaining access to a sufficient number of channels to provide competitive service," because holders of licenses have "warehoused" channels for future use. *1994 Competition Report* at ¶ 85. The FCC has been working on licensing DBS systems since 1980. Notice of Inquiry, *Direct Broadcast Satellites*, 45 Fed. Reg. 72719 (Nov. 3, 1980). To date, only three systems are operational.

Pet. App. 66a-69a. In its rehearing petition in the Court of Appeals, NCTA suggested that the court vacate its judgment in light of a supposedly new-found "saving construction" of the statute that in fact had been briefed and argued from the very beginning of the case.[31] On certiorari, petitioners urged this Court to vacate the Court of Appeals' judgment and remand the case in light of the FCC's reinterpretation of its "good-cause waiver" authority in the *Third Report and Order*. This Court declined to do so. 115 S. Ct. 2608 (1995).

There is no reason to take petitioners' "saving construction" more seriously at this stage.

1. The *Third Report and Order* is nothing more than a statement of the FCC's unilateral intent, subject to change at any time in the Commission's discretion, to permit telephone companies to provide video programming under certain circumstances and pursuant to unspecified "terms and conditions" still to be devised by the Commission. Supp. Br. App. 6a n.11, 13a-14a. As such, it provides no reason for this Court to refrain from holding § 533(b) unconstitutional.[32] Whether in the end the Commission will in fact adopt a "more speech-friendly" plan (Supp. Br. App. 3a) — or whether the terms will even be economically or technologically feasible — remains to be seen.

The history of the FCC's decisionmaking in this area is not reassuring. The FCC has been studying and proposing the

[31] Petitioners repeat here the suggestion that the saving construction was not presented to the courts below. Govt. Br. 39; NCTA Br. 17, 27. If that were true, this Court should adhere to its usual prudential rule in federal cases of declining to decide issues not raised or resolved in the lower court. *E.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). In fact, however, the saving construction was briefed in, and properly rejected by, the courts below. *See* Response to Petitions for Cert. at 16-20 (May 30, 1995).

[32] *See Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301 (1993) ("a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (repeal of law does not prevent judicial review because repeal "would not preclude [the city] from reenacting precisely the same provision if the District Court's judgment were vacated").

elimination of § 533(b) since 1987.[33] But not until May 16, 1995 — nearly two years after the Commission was first enjoined from enforcing the ban and on the eve of the filing of the Solicitor General's petition for certiorari in this case — did the Commission suggest taking any action. In recently voting to repeal § 533(b), Members of Congress criticized the Commission for its tardiness.[34]

Indeed, the FCC has twice banned telephone companies from providing video programming over their networks despite outstanding federal court orders to the contrary.[35] If this Court overturns those orders, there will be nothing to stop the FCC from abandoning the *Third Report and Order* entirely, reinstating a narrow good-cause waiver policy, and resuming strict enforcement

[33] In 1987, the FCC issued a Notice of Inquiry proposing re-examination of § 533(b). 2 FCC Rcd 5092, 5093 (1987). The next year, it issued a Further Notice of Inquiry and Notice of Proposed Rulemaking tentatively concluding that § 533(b) should be eliminated. 3 FCC Rcd 5849, 5851, 5865 (1989). After a four-year delay, the Commission formally reaffirmed that conclusion. *Video Dialtone Order*, 7 FCC Rcd at ¶¶ 135-43.

[34] *See, e.g.*, 141 Cong. Rec. S 7965 (June 8, 1995) (statement of Sen. Craig) ("It has taken more than 4 years for the FCC to create a general framework for video dial tone, and with each successive ruling more and more constraints have been placed on telephone companies wishing to offer cable TV services. That is not the way to foster competition. And it is not giving consumers the additional cable choices they have all asked for and they think in a free market they ought to be able to receive. In effect, the FCC 4-year delay has prevented robust competition in the cable industry.").

[35] Even though the FCC is bound by a district court order enjoining enforcement of § 533(b) — which it has never sought to stay — the FCC has denied Bell Atlantic the right to provide video programming over an approved video dialtone system in Dover Township, New Jersey. Order and Authorization, *Application of New Jersey Bell Tel. Co.*, 9 FCC Rcd 3677, 3690 (1994). Bell Atlantic asked the FCC to reconsider its decision as inconsistent with the injunction, but the request remains pending with the FCC more than a year later, *Petition of Bell Atlantic-New Jersey for Limited Reconsideration*, File No. W-P-C 6840 (Aug. 17, 1994), despite a statutory 90-day deadline for ruling on reconsideration requests. 47 U.S.C. § 405(b)(1). The Commission recently prohibited another telephone company from speaking on its video dialtone system, notwithstanding another federal court order to the contrary. *See* Memorandum Opinion and Order on Recon., at ¶ 8, *Application of Ameritech Operating Companies*, File Nos. W-P-C 6926, *et al.* (Oct. 6, 1995).

of what the FCC calls "the absolute ban contained in the statute." Supp. Br. App. 4a. The FCC issued its *Third Report and Order* only in reaction to judicial decisions holding § 533(b) unconstitutional. *Id.* at 6a-7a & n.13. In fact, the Commission's admitted goal was to "make it unnecessary for [the Supreme Court] to decide whether a complete prohibition on video programming by telephone companies in their exchange areas is constitutional." *Id.* at 7a. Unless this Court affirms the judgment below, a principal basis of the FCC's action would disappear. The Commission has warned telephone companies that, "[i]f the government prevails in the Supreme Court, we will have to conduct further proceedings to determine how best to bring the parties into compliance with the Court's judgment." Fourth Report and Order, at ¶ 25, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, FCC 95-357 (Aug. 14, 1995).

2. Petitioners' "saving construction" is in any event not a plausible interpretation of § 533(b). Although statutes are construed to avoid constitutional difficulties, "'avoidance of a difficulty will not be pressed to the point of disingenuous evasion.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

The *Third Report and Order* purports to change § 533(b) from what the Commission calls an "absolute ban," Supp. Br. App. 4a, to a restriction that the Commission can "routinely" waive at its option. *Id.* at 19a. Yet the statutory language of § 533(b)(4) indicates that waivers are available only on the basis of "the particular circumstances demonstrated by the petitioner."[36] Section

[36] Section 533(b)(4) provides:

> In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular

533(b)(4) also references "section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984)," which prescribes a series of procedures for case-by-case, fact-specific inquiries focusing on exceptional circumstances — a test that is inconsistent with the broad waiver standard now proposed by the FCC.[37] The Commission may not simply rewrite a section of the Communications Act. *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994).

Not surprisingly, the *Third Report and Order* flies in the face of the only authoritative judicial interpretation of § 533(b)(4). In *National Cable Television Ass'n v. FCC*, 914 F.2d 285 (D.C. Cir. 1990), the Court of Appeals, at the urging of the NCTA, reversed a good-cause waiver granted by the Commission to a telephone company affiliate to participate in the operation of an experimental fiber-optic system in a single California community — a much more limited request than the sea change proposed by the *Third Report and Order*. The Court of Appeals disagreed that the Commission "enjoyed considerable latitude" in granting good cause waivers. *Id.* at 288. The court explained that "[t]he policy of the subsection, which the Commission must take into consideration, is to prohibit" telephone company video programming. *Id.* at 289. The court held that a waiver was unavailable absent a showing that telephone company participation was "necessary" to the construction or operation of a cable system. *Id.*

circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

[37] Indeed, that approach conflicts with the concept of "good cause waiver" as it is used throughout the U.S. Code. For example, an agency could not use the good cause exception for notice and comment procedures, 5 U.S.C. § 553, to decide that it will depart on a "routine" basis from Administrative Procedure Act requirements. *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) ("good cause" exception "is essentially an emergency procedure"). Nor could a U.S. Attorney's office use the "good cause" provision of the Speedy Trial Act to declare that it will "routinely" extend the 90-day period provided in 18 U.S.C. § 3161. *E.g.*, *Furlow v. United States*, 644 F.2d 764, 767 (9th Cir.), *cert. denied*, 454 U.S. 871 (1981) (Mt. St. Helen's eruption satisfied "good cause" requirement). *See also Kleem v. INS*, 479 U.S. 1308 (1986) (Scalia, Circuit Justice) (construing "good cause" rule of 28 U.S.C. § 2101(c)).

The *Third Report and Order* also contradicts the Commission's previous construction of its waiver authority. The FCC previously held that "it 'is the policy of this subsection [§ 533(b)] that telephone companies should be prohibited from providing video programming directly to subscribers in their telephone service areas. The waiver authority should be narrowly construed and exercised in a manner that does not undermine the basic policy of this subsection.'"[38] The *Third Report and Order* barely acknowledges this radical shift in the Commission's interpretation, let alone attempts to explain it, as the FCC was required to do.[39] For its part, the NCTA previously has argued for a limited view of § 533(b)(4).[40]

3. Even if valid, the construction is not a "saving" one. If anything, it *compounds* the constitutional infirmity in § 533(b) by vesting the Commission with impermissibly broad licensing power over telephone company speech. In fact, by illustrating how the FCC can dramatically expand and contract its waiver authority at will, the *Third Report and Order* underscores just how vast the Commission's discretion is. The Commission unilaterally promises that it will "routinely" grant waivers so long as "the telephone company agrees to abide by the regulations we will establish governing its provision of video programming." Supp. Br. App. 19a. But under the *Third Report and Order*, telephone company

[38] *Telephone Company-Cable Television Cross Ownership Rules*, 3 FCC Rcd 5849, 5850 (1988) (quoting 130 Cong. Rec. H 10,444 (daily ed. Oct. 1, 1984)); *see also* 1970 Order at ¶ 11 (waiver policy "should be on a case-by-case basis, . . . rather than by any blanket exemption"); JA 43 n.7 (waiver standard imposes a "high burden"); Br. of Government in *Ameritech Corp. v. United States*, No. 95-1223, at 43 (7th Cir.) (filed Mar. 13, 1995) (admitting that the possible re-interpretation of § 533(b)(4) "would constitute a significant change in the agency's prior understanding of the statutory requirements").

[39] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (agency "litigating positions" not entitled to deference).

[40] *See, e.g.*, Br. of Petitioner in *NCTA v. FCC*, No. 89-1517, at 37 (D.C. Cir. filed Apr. 6, 1990) ("Congress has instructed that [the FCC's] waiver authority must be narrowly construed").

video speech will still be illegal until the Commission decides whether, when, and how to allow it. The Commission has the power to create, and to change, the still-to-be-developed terms and conditions for granting waivers, and there is no specified time within which the Commission is required to act on waiver applications.[41] It was stipulated in this case that waiver applications have languished for years before the Commission. *See* JA 204-05.[42]

Thus, the good-cause waiver authority is itself an open-ended grant of standardless licensing power, in violation of the fundamental principle that the government "cannot vest restraining control over the right to speak [in] an administrative official where there are no appropriate standards to guide his action." *Kunz v. New York*, 340 U.S. 290, 295 (1951).[43] For First Amendment purposes, the waiver regime in the *Third Report and Order* is no different from a city's flat ban on holding rallies in a public park, accompanied by a promise from the police chief that "good cause" exceptions will be granted according to "speech-friendly" standards to be developed sometime in the future. The technology is different, but the principle is the same.

4. Moreover, far from *avoiding* constitutional issues, the construction raises grave *new* constitutional questions. Instead of permitting each telephone company to provide video programming *either* as a traditional (*i.e.*, non-common carrier) cable provider *or* as one of the programmers on a common carrier video dialtone system — as would the bills recently adopted by each House of Congress[44] — petitioners' "saving construction" would permit telephone companies to provide video speech *only* through video dialtone. Thus, the Government emphasizes that the FCC's waiver policy "requires a common carrier element." Govt. Br. 40.[45] Although some telephone companies might voluntarily choose a video dialtone system to provide video programming (as Bell Atlantic would do in Alexandria, Virginia, *see* JA 13, 214-15, 218), designating such a system as the only option for video speech itself raises grave constitutional questions.

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[41] "[T]he failure to confine a time within which the licensor must make a decision contains the same vice as a statute delegating excessive administrative discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-27 (1990); *see also City of Lakewood*, 486 U.S. at 771; *Riley*, 487 U.S. at 802.

[42] Waiver applications contested by cable incumbents have taken as long as 1,113 days for the FCC to process. *Bentleyville Telephone Co., Petition for Waiver of Sections 63.54 and 63.55 of the Commission's Rules and Application for Authority to Construct and Operate a Cable Television System Within Its Telephone Service Area*, File No. W-P-C 6817 (May 16, 1995). Likewise, applications to deploy facilities for video dialtone service, which the Commission has held are an essential prerequisite to providing programming, have been substantially delayed. For example, one application is still pending after nearly three years. *Application of New Jersey Bell*, File No. W-P-C 6838 (filed Nov. 16, 1992). *See* 141 Cong. Rec. S 8193-94 (June 12, 1995) (statement of Sen. Kerrey) ("telephone companies saw their applications to offer [video dialtone] languish as agency officials insisted on changes in many plans. Today, only a handful of tiny experiments exist").

[43] The Government insists that this principle is inapplicable because the waiver supposedly will not be explicitly based "on the content of the speech." Govt. Br. 41. But the same could have been said in *City of Lakewood*, 486 U.S. at 755-59, 769-72, *FW/PBS, Inc.*, 493 U.S. at 225-26, *Riley*, 487 U.S. at 801-02, *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964 n.12 968 (1984), *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969), *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958), *Saia v. New York*, 334 U.S. 558, 559-61 (1948), *Largent v. Texas*, 318 U.S. 418, 422 (1943), *Schneider*, 308 U.S. at 163-64, and *Lovell*, 303 U.S. at 451.

[44] The Government implies that the bills are limited to the video dialtone option, Govt. Br. 16 n.12, but that is incorrect. For example, H.R. 1555 provides that a telephone company may provide video programming either as a programmer on a video dialtone system or "as a cable service." H.R. 1555, 104th Cong., 1st Sess. § 201 (1995). *See* 141 Cong. Rec. E 1699 (Aug. 11, 1995) (remarks of Rep. Tauzin) (H.R. 1555 "gives all telephone companies the choice between entering video markets as Title II common carriers or as Title VI cable operators."); *see also* S. 652, 104th Cong., 1st Sess. § 202(a) (1995).

[45] Petitioners also attempt to defend the "saving construction" as preventing telephone companies from purchasing incumbent cable systems. Govt. Br. 42, NCTA Br. 31-32. But § 533(b) does not bar telephone companies from owning or buying cable systems. *See* pp. 13-14, *supra*. Moreover, Clayton Act § 7 already bars acquisitions where their effect "may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 18; *see also* JA 249-50. Petitioners have never disputed that "existing antitrust laws could be applied to prohibit telephone companies from acquiring cable companies within their telephone service areas." Respondents' Dist. Ct. Reply Br. 7 (June 5, 1993).

A mandatory common carrier scheme, even if efficiently administered, would dramatically raise the cost of telephone company video speech: If telephone companies wished to provide video programming, they would have to do so through a system that contains sufficient excess capacity to allow a substantial number of other speakers to communicate as well. They could not simply build enough capacity to allow *themselves* to speak.[46] The FCC has suggested that it may preclude a telephone company from speaking on as much as 75% of the capacity on its system. Supp. Br. App. 13a n.34; *Video Dialtone Order*, 7 FCC Rcd at ¶ 143 n.360. Such a draconian limit on the quantity of expression would be far worse even than the displacements of speech that were found invalid in *Hurley*, 115 S. Ct. at 2349-50 (addition of a small group to parade), *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 17-18 (1986) (small insert in "extra space" of billing envelope), or *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (short reply in newspaper), or than the displacement of a potentially small number of cable channels by the must-carry rules in *Turner*, 114 S. Ct. at 2471-72; *see also* Br. of Govt. Respondents in *Turner*, No. 93-44 at 30 ("If the operators are right, . . . 98% of the broadcast stations that are entitled to be carried . . . would be carried in any event").

That a telephone company is a common carrier for purposes of voice transmissions does not mean that it may be forced to *speak* only as a common carrier.[47] And the FCC's requirement would

[46] NCTA concedes that the FCC's waiver policy will be "distinctly objectionable" to those telephone companies that want to build only enough transport capacity to carry their own video speech. NCTA Br. 29 n.23.

[47] It is axiomatic that a telecommunications company "may operate as a common carrier with respect to a portion of its service only." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979); *see also National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481, 1484 (D.C. Cir. 1994) (whether a service is a common carrier service turns not on telephone company's status overall, but on nature of "the particular practice under surveillance").

raise major Takings Clause concerns as well, for commandeering a portion of the telephone network for mandatory common carriage of video signals would seem to be an uncompensated electronic occupation of private property that is in principle indistinguishable from the law invalidated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1057 (8th Cir. 1978) (FCC rule requiring cable companies to build excess capacity and operate in part as a common carrier constituted a taking in violation of the Fifth Amendment), *aff'd on other grounds*, 440 U.S. 689 (1979).[48]

Neither the *Third Report and Order* nor petitioners' briefs confront any of these difficult questions. Hence, the proper disposition of this case is to hold § 533(b) facially invalid. If the Government believes that a different regulatory regime would be permissible, it is free to adopt that scheme and let its constitutionality be adjudicated in due course. But it cannot simply ban telephone company video speech in the interim.

[48] *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), does not suggest a different result. "Notably absent from [*PruneYard*] was any concern that [the state law] might affect the shopping center owner's exercise of his own right to speak." *Pacific Gas & Elec. Co.*, 475 U.S. at 12; *see id.* at 23-24 (Marshall, J., concurring in judgment) ("While the shopping center owner in *PruneYard* wished to be free of unwanted expression, he nowhere alleged that his own expression was hindered in the slightest.").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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